



Legal Update

March 31, 2014

The Court held that the discovery of ammunition found in plain view inside a vehicle parked on a college campus along with additional factors justified conducting a patfrisk of the defendant and searching his backpack!

Commonwealth v Jason Whitehead, Mass. Appeals Court No. 12-P-1970

Background: Officer Kevin Donovan (hereinafter referred to as "Officer Donovan") was dispatched to Cape Cod Community College on a report that security officers had observed ammunition in *plain view* inside a locked Jeep in a college parking lot. After the vehicle was identified, Officer Donovan observed decals that included "Kill 'Em All Let God Sort It Out" and "Sniper No Need to Run--You'll Only Die Tired," attached to the vehicle along with a sign that said "Funeral," hanging in the rearview mirror. Officer Donovan observed three (3) rounds of ammunition for a semiautomatic weapon--a nine millimeter round, a .38 caliber round, and an empty nine millimeter shell casing and a camping knife on the center console when he looked inside the closed window of the vehicle.

Officer Donovan was verifying who the owner of the vehicle was, when the defendant, Jason Whitehead (hereinafter referred to as "Whitehead") walked towards the vehicle. Whitehead was wearing Army camouflage pants, black boots, a dark black sweatshirt, a camouflage hat, and he had a black backpack strapped to his back. Whitehead yelled to Officer Donovan, "Can I help you?" Officer Donovan asked Whitehead if he was the owner of the vehicle. Whitehead approached Officer Donovan in an "aggressive posture" responded that he was the owner of the vehicle. When Officer Donovan asked Whitehead whether he had a firearm

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on his person, Whitehead responded “No, are you supposed to be asking me that question?” Officer Donovan conducted a patfrisk of Whitehead and did not recover any weapons or contraband. Whitehead did have a firearm identification (FID) card which allowed him to carry ammunition in a locked vehicle. Officer Donovan told Whitehead he was going to place him in the backseat of the cruiser while he patted Whitehead’s backpack and advised him of his Miranda rights. At that point, Whitehead said "Wait there's a loaded gun in the bag." Officer Donovan immediately placed Whitehead in the back of the cruiser with a closed the door, and searched the backpack. A black Smith & Wesson 380 semiautomatic handgun loaded with eighteen bullets, an ankle-style holster, and two additional magazines were recovered and Officer Donovan arrested Whitehead.

Whitehead was charged with carrying a firearm without a license, carrying a firearm on school grounds, and possession of a firearm without a FID. Whitehead filed a motion to suppress and argued that Officer Donovan exceeded the Terry-type patfrisk of his person in searching his backpack after finding Whitehead’s FID card. The judge denied the motion and concluded that Officer Donovan’s patfrisk was justified as well as the search of Whitehead’s backpack. The discovery of the FID card did not dispel the possibility that Whitehead may be armed. The judge noted that an open college campus, along with Whitehead’s attire and aggressive posture further supported Officer Donovan’s actions. “Although Officer Donovan focused on the ammunition, the language on the decals affixed to the vehicle is an additional factor that would warrant an individual in the officer's position to fear that his safety or the safety of others was in jeopardy.” After a bench trial, Whitehead was convicted of unlawfully carrying a firearm on school grounds and carrying a firearm without a license and appealed.

Conclusion: The Court affirmed Whitehead’s convictions and held that Officer Donovan was justified in conducting a patfrisk of Whitehead and searching his backpack.

1st Issue: Was the stop and frisk justified?

The Court held that there were a number of factors that justified Officer Donovan’s stop and frisk of Whitehead. The initial report that Officer Donovan received regarding the discovery of ammunition in “plain view” inside a vehicle parked on an open college campus heightened concern “in the wake of school shootings such as Columbine, Colorado; Santee, California; and Newtown, Connecticut, ” *Commonwealth v. Milo M.*, 433 Mass. 149, 156 (2001). “The presence of the ammunition alone gives rise to the reasonable inference that a gun might be nearby.” See *Commonwealth v. Kitchings*, 40 Mass.App.Ct. 591, 598 (1996) (“the loaded ammunition clip in the van ... conveyed the clear message that one or more guns were probably in the van”).

Whitehead’s camouflage attire and aggressive posture as he approached Officer Donovan raised further concerns. Additionally, the threatening decals attached to Whitehead’s vehicle along with three (3) types of ammunition and a hunting knife openly displayed in the vehicle increased the possibility that Whitehead could have multiple firearms. As the Court noted “there

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is a heightened sensitivity of school officials to signs that a student may have brought guns onto school property and might embark on a shooting rampage.” See generally G.S. Katzmman (ed.), *Securing Our Children's Future: New Approaches to Juvenile Justice and Youth Violence* 1-27, 386-414 (2002). The Court does not expect officers to have “absolute certainty that the individual is armed, but rather the basis for his acts must lie in a reasonable belief that his safety or that of others is at stake. The process of determining whether an officer had reasonable suspicion does not deal with hard certainties, but with probabilities.” See *Commonwealth v. Silva*, 366 Mass. at 406. The purpose of a Terry-type stop and frisk is not to discover evidence of a crime, but to protect police and the public and allow police officers to pursue their investigation without fear of violence. *Terry v. Ohio*, 392 U.S. 1, 27, 29 (1968).

2nd Issue: Did Officer Donovan exceed the scope when he searched Whitehead’s backpack?

After examining the same factors it considered when evaluating the initial stop and frisk, the Court held that the search of Whitehead’s backpack was justified. “The same factors justifying the patfrisk of the defendant’s person justified a patfrisk of the backpack he carried. If the Court had established a rule prohibiting the search of Whitehead’s backpack, it would potentially allow the defendant to leave the scene with a weapon that could be used against the officer as soon as the defendant regained possession of the bag.” See *Commonwealth v. Pagan*, 440 Mass. 62, 72-73 (2003). Even though Officer Donovan did not recover any weapons during the patfrisk of Whitehead, Officer Donovan’s suspicions did not end as Whitehead argued on appeal.

The Court also disagreed with Whitehead’s contention that the discovery of his FID card permitting him to possess ammunition in a locked vehicle diminished Officer Donovan’s reasonable suspicion to continue the search of his backpack. “Thus, even a person licensed to possess ammunition (or a firearm) cannot possess it on school grounds without the permission of school authorities.” See *Commonwealth v. Monteiro*, 75 Mass.App.Ct. at 285. M.G.L. c. 269, § 10(j), as appearing in St.1989, c. 648. The Court emphasized that “a license to possess ammunition or a firearm is not a defense to prosecution under § 10(j)--lacking the permission of school authorities, a suspect would still be subject to prosecution.” See *Commonwealth v. Sayers*, 438 Mass. 238, 240 (2002).

Lastly, Whitehead’s admission that he had a loaded gun inside his backpack on a college campus prior to Officer Donovan’s search confirmed the validity of the officer’s concern for his own safety and the safety of the college community. The Court concluded that Officer Donovan searched “only what was necessary to ensure that the defendant did not have access to a weapon in his backpack, threatening the safety of both the officer and of the college community.” Since the officer’s search was not a generalized search for evidence but rather was limited to looking for weapons that could pose a danger to the officer and the public, the search did not cross the threshold of an impermissible search. See *Commonwealth v. Santos*, 65 Mass. App. Ct. 122, 125 (2005).

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Commentary:

This case reinforces that the Court never expects an officer to jeopardize public safety or an officer's safety. Unlike *Flemming*, where the Court held that the defendant's cooperation and non threatening movements, failed to justify the police's decision "to lift the defendant's shirt without conducting a patfrisk" first, the Court in this case found that the location of the incident along with Whitehead's appearance and aggressive posture certainly supported Officer Donovan's actions. *Commonwealth v. Flemming* 76 Mass.App.Ct. 632, 638 (2010).

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